

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 97-0067

Use Tax

For The Period: 1992 Through 1995

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Use Tax - Printing of Annual Reports

Authority: Indiana Department of State Revenue v. Indianapolis Transit System, Inc., 356 N.E.2d 1204 (Ind. Ct. App. 1976)

The taxpayer protests the imposition of use tax on the cost of printing an annual report.

II. Use Tax - Purchase of Snack Foods

Authority: U.S. Air, Inc. v. Indiana Department of State Revenue, 623 N.E.2d 466 (1993).

The taxpayer protests the imposition of use tax on the purchase of snack foods (peanuts and pretzels).

III. Use Tax - Purchase of Cups, Straws, Napkins, Etc.

Authority: IC 6-2.5-5-20; IC 6-2.5-5-35

The taxpayer protests the imposition of use tax on the purchase of cups, straws, stirrers, napkins, tray mats, and plastic utensils.

IV. Tax Administration - Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-1 & 2

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer is a fully-certified and licensed passenger air carrier headquartered in Indianapolis, Indiana. The taxpayer provides regularly scheduled passenger service to popular vacation destinations and major business centers. The taxpayer's fleet of aircraft are primarily supported by its own maintenance and engineering technicians.

I. Use Tax - Printing of Annual Reports

DISCUSSION

The taxpayer protests the imposition of use tax on the cost of printing an annual report. The taxpayer contends that the Indiana Court of Appeals affirmed the decision of Judge Niblack of the Marion Circuit Court in the case Indiana Department of State Revenue v. Indianapolis Transit System, Inc., 356 N.E.2d 1204 (Ind. Ct. App. 1976). The Marion Circuit Court decision, in favor of the taxpayer, determined that publications concerning financial matters were indeed required in rendering public transportation. The Indianapolis Transit case dealt with a public (government) corporation subject to Indiana statutes which controlled its operations. Indianapolis Transit was statutorily required to provide at least annually a report concerning financial matters. If this provision was not followed, Indianapolis Transit would lose its permit to operate. The taxpayer is under no such statutory guidelines and only publishes its annual report because its shares are publicly traded.

FINDING

The taxpayer's protest is denied.

II. Use Tax - Purchase of Snack Foods

DISCUSSION

The taxpayer protests the imposition of use tax on the purchase of snack foods (peanuts and pretzels). The taxpayer purchases large quantities of snack food items such as peanuts and pretzels from ML Co. Such items are shipped to a caterer in Indiana in case lots and stored in Indiana until such time as they are needed. As the snacks are needed, they are removed from storage and placed on the airplanes by the caterer. The taxpayer contends that the snacks are never used within Indiana since on departures from Indiana, the boxes of snacks are not open, prepared, or served until the plane has left Indiana air space. In support of its position the taxpayer cites U.S. Air, Inc. v. Indiana Department of State Revenue, 623 N.E.2d 466 (1993). The taxpayer states, "In U.S. Air, Inc. v. Indiana Department of State Revenue, 623 N.E.2d 466 (1993), the issue was before the Indiana Tax Court as to the taxability of food served on U.S. Air flights. The Court determined that meals were subject to the tax because they were not stored in Indiana for subsequent use solely outside of Indiana. The Department had initially assessed tax on the purchases from ML Co., but that assessment was settled and no tax was due on the food purchased from ML Co. (Taxpayer) believes that the U.S. Air

settlement in regard to purchases from ML Co., was indeed correct and followed the Court's decision with regard to catered food purchases which were not stored in Indiana. (Taxpayer) believes it should be afforded like treatment and the proposed assessment on snacks purchased from ML Co. must be abated."

The snacks purchased by the taxpayer are taxable. As the Tax Court in USAir stated, "...The location where the food is eaten, however, is not dispositive under the statute...the food is transported until it reaches the location outside Indiana at which it is eaten. Transport is not storage. USAir simply holds the food in the plane's bellies and kitchens incident to transporting the food. USAir exercises ownership rights over the food in Indiana ..." Not only are the snacks taxable but the agreement reached between U.S. Air, Inc. and the Department was based upon a different set of facts. In the USAir case, the issue of purchases from ML Co. was dropped as an issue based upon the Department's literal reading of IC 6-2.5-3-1, and considering the food from MLCo was placed in the planes immediately. In this instance, the taxpayer argued that the snacks were stored in Indiana until such time as they were needed.

FINDING

The taxpayer's protest is denied.

III. Use Tax - Purchase of Cups, Straws, Napkins, Etc.

DISCUSSION

The taxpayer protests the imposition of use tax on the purchase of cups, straws, stir sticks, napkins, tray mats, and plastic utensils. Pursuant to IC 6-2.5-5-35, transactions involving tangible personal property are exempt from the state gross retail tax if, "(1) the: (A) person acquires the property to facilitate the service or consumption of food that is not exempted from the state gross retail tax under section 20 of this chapter..." Section 20 applies to restaurants that acquire tangible personal property to serve food that is sold to its customers. The code section was written in contemplation of the cost of the property to be included in the cost of the food when it was sold. Without this provision, the property would be taxed twice. In this case, that taxpayer is not selling food to its customers and the tax it pays on the cost of the food does not include the cost of the property its purchases to facilitate the service of providing the food to its customers. In this case, the taxpayer does not sell its food to its customers, therefore, they do not collect sales tax. Without a sale of food to its customers the taxpayer cannot fall under IC 6-2.5-5-20. Without falling under IC 6-2.5-5-20 that taxpayer cannot avail themselves of the protection afforded by IC 6-2.5-5-35.

FINDING

The taxpayer's protest is denied.

IV. Tax Administration - Penalty

DISCUSSION

The taxpayer protests the Department's imposition of the ten percent (10%) penalty assessment. Indiana Code section 6-8.1-10-2.1 requires a ten percent (10%) penalty to be imposed if the tax deficiency is due to the negligence of the taxpayer. Department regulation 45 IAC 15-11-2 provides guidance in determining if the taxpayer was negligent in nature.

Departmental regulation 45 IAC 15-11-1(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is also to be determined on a case-by-case basis according to the facts and circumstances of each taxpayer.

Subsection (d) of IC 6-8.1-10-2.1 allows the penalty to be waived upon a showing that the failure to pay the deficiency was due to reasonable cause. Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish reasonable cause, the taxpayer must show that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed. . ."

In this instance, the taxpayer has not shown reasonable cause. The taxpayer has not provided to the Department's satisfaction, sufficient justification for interpreting the code as it did.

FINDING

The taxpayer's protest is denied. The taxpayer has not provided to the Department's satisfaction, sufficient justification for interpreting the code as it did.